IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1501 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

And

HON'BLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDUL KAYUM @ MUFTI SAB AHMADHUSEN MANSURI & 1 - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR ND NANAVATI, SR. ADVOCATE with MR RK SHAH with MRS SHILPA J UNWALLA for Petitioner No(s).: 1,2.

MR AD OZA, PUBLIC PROSECUTOR with MR AJ DESAI, APP for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE M.S.SHAH

and

HON'BLE MR.JUSTICE BANKIM.N.MEHTA

Date : 21/07/2005
ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This appeal under Section 34 of the Prevention of Terrorism Act, 2002 (hereinafter referred to as "the POTA") is directed against the judgment and order dated 15.7.2005 passed below Exh. 311 in Special POTA Case No. 16 of 2003.

2. In the above case, charge sheet was filed in November, 2003 and all the accused were supplied the statements of the witnesses including witness B-1 to B-14 whose names were not disclosed. The trial commenced about a year back. On account of the controversy about the constitutionality of the provisions of the POTA Repeal Act and the role to be played by the POTA Review Committee, the trial remained stayed for about eight months. When the stay came to be vacated, the trial commenced and 49 witnesses were examined till 14.7.2002. On 15.7.2002, PW 50 (B-3) and PW 51 (B-4) were to be examined. Before the evidence of the above two witnesses came to be recorded, the learned advocate for accused Nos. 2 and 5 filed application Exh. 311/A objecting that the evidence of the witnesses whose identity was disclosed on 14.7.2005 cannot be recorded because their evidence would be considered by the Court for the purpose of deciding the guilt of the accused without granting pardon to those witnesses. It was contended that in view of the contents of the statements of witnesses B-1 to B-14 (out of whom identity of witnesses B-3 (PW 50) and B-4 (PW 51) was disclosed on 14.7.2005), they had played the same role as alleged against the accused and, therefore, they were accomplices in the alleged crime. In support of this contention, reliance was placed on Sections 306 to 310 of the Code of Criminal Procedure, which provide the procedure for tendering pardon to accomplice. The power of pardon is given to the Courts only. The police has no power to grant pardon and the grant of pardon is not in the discretion of the police authorities. The statements of the witnesses are self-incriminatory and confessional in nature

affecting themselves and the accused. Therefore, it was contended that the power of investigation was misused and this illegality in investigation was not cured by any provision of the Code.

After hearing the learned advocate for the appellants and the learned Public Prosecutor, the learned Special Judge, POTA, dismissed the application by a speaking order dated 15.7.2005 which is under challenge in this appeal. Thereafter, PW 50 (B-3) came to be examined and cross-examined on 15.7.2005. On that day, PW 51 (B-4) was examined-in-chief and his cross examination also commenced at the end of the day. Since the Court's time was over, by the consent of the learned advocates of the parties, recording of the evidence was further fixed on 25.7.2005.

3. Mr ND Nanavati and Mr RK Shah, learned counsel for the appellants have vehemently submitted that on correct interpretation of Sections 306 to 308 of the Code of Criminal Procedure, the learned Special Judge, POTA could not have recorded the evidence of the above two witnesses without granting them pardon and that recording of the evidence of the said two witnesses without granting pardon amounts to breach of the provisions of Sections 306 and 307 of the Code of Criminal Procedure.

It is vehemently submitted by the learned counsel for the appellant-accused that the power of granting pardon is vested only in the Courts and such powers can be exercised either by the Magistrate at the stage of committal proceedings or by the Sessions Court during the trial before the pronouncement of the judgment. But, no such power can be exercised by the investigating officer or prosecuting agency. It is further submitted that what the investigating agency or prosecuting agency have done in the instant case is that the persons who had made incriminating statements recorded by the police under Section 164 of the Code of Criminal Procedure were wrongly not arraigned as accused but cited as witnesses and thereby the investigating officer impliedly exercised

the power of pardon which is not available to him under Section 306 of the Code of Criminal Procedure.

In support of their contentions, the learned counsel for the appellant-accused have relied on the decisions of the Apex Court in **P. Sirajuddin vs. State of Madras, 1971 Cri.LJ 523 = AIR 1971 SC 520** confirming the decision of a Division Bench of the Madras High Court in **P. Sirajuddin vs. State, 1968 Cri.LJ 493 = AIR 1968 Madras 117** and also on the decision in **Suresh Chandra Bahri vs. State of Bihar, 1995 Supp (1) SCC 80.**

4. On the other hand, Mr AD Oza, learned Public Prosecutor with Mr AJ Desai, learned APP have supported the judgment of the learned Special Judge, POTA. The learned Public Prosecutor, apart from making legal submissions, also read out the evidence of the two witnesses (PW 50 and PW 51) who were examined-in-chief and cross-examined on 15.7.2005 in support of his contention that in the facts of this case, it cannot be said by any reasonable person that the witnesses in question were directly or indirectly concerned in or privy to the offence for which the special case is being tried.

5. Having heard the learned counsel for the appellant-accused and the learned Public Prosecutor, we are not inclined to accept the submissions made on behalf the appellant-accused.

6. As regards the contention that the power of pardon is vested in the Courts and not in the investigating officer or the prosecuting agency, on bare reading of the provisions of Sections 306 to 308 of the Code of Criminal Procedure, there cannot be any dispute on this proposition of law. However, the grievance in this appeal proceeds on the assumption that Sections 306 and 307 are in the nature of safeguards for the accused. It appears to us that far from being any such safeguard, Sections 306 and 307 lay down a

clear exception to the principle that no inducement shall be offered to a person to disclose what he knows about the offence. The provisions of Sections 306 and 307 empower or enable the Court to grant pardon to an accomplice in the crime, lest for want of evidence no accused should be convicted. If a person is prepared to be examined as a witness without asking for any pardon from the Court, because the witness does not believe himself to be involved directly or indirectly in or privy to the offence, there is nothing in these provisions to prevent the prosecution from examining such a person as a witness nor do these provisions prevent a person from coming forward as a witness without inquiring from the Court whether any pardon will be granted to him in case the Court finds him to be involved in or privy to the offence.

7. In the instant case, the charge sheet was filed in November, 2003 and except for the period for which the trial remained stayed as indicated earlier, 49 witnesses had already been examined by 3.7.2005. Till then, it was not the case of any of the accused, and no proceedings were filed, contenting that the witnesses B-1 to B-14 were illegally cited as witnesses and not arraigned as accused. Even no such plea is raised in the appeal. All that is being contended on behalf of the accused is that because the statements of the two witnesses – B-3 and B-4 – recorded by the police during the investigation and recorded by the Executive Magistrate under Section 164 of the Code of Criminal Procedure before filing of the charge sheet are self-incriminatory and that the decision of the investigating agency not to arraign them as accused but to cite them as witnesses amounted to implied grant of pardon to the said witnesses. The learned Special Judge has rightly observed that Section 319 of the Code of Criminal Procedure confers wide powers on the Court to proceed against any person not being an accused, if it appears to the Court in the course of the inquiry or trial of the offences that any person not being an accused has committed any offence for which the person could be tried together with the accused.

8. At this stage, we may also refer to the following observations made by the learned Special Judge in the order impugned in this appeal :-

> "the entire statements of the witnesses if are looked at as rightly pointed out by the Ld.Sp.PP Mr Dhruva that some of the witnesses after some time appear to have severed ties with the accused and the circumstances under which the same has been done also has been explained by him in the statement. Moreover, when s.132 of Evidence Act grants protection to the witness and S.133 of Evidence Act makes accomplice a competent witness, where of course, he needs to be corroborated in material particulars if one looks at s.114 of Evidence Act, it would not be possible for this Court to at this stage accede to the request of the defence to stop the prosecution from examining these witnesses on the ground of they being either accomplices or by jumping to the conclusion that they had been granted pardon by the prosecuting agency when no such thing has come on record."

We may also note that the examination in chief or cross-examination of PW 50 (B-3) is over on 15.7.2005 and examination-in-chief of PW 51 (B-4) is over and his cross-examination has commenced on 15.7.2005 and on account of the Court time being over, the case is adjourned to 25.7.2005 for recording further evidence.

9. Reliance placed by the learned counsel for the appellants on the decision of the Apex Court in **P. Sirajuddin vs. State of Madras, 1971 Cri.LJ 523 = AIR 1971 SC 520** is misconceived as the facts in that case were entirely different. That was a case where the writ petitioner-appellant was facing prosecution under the provisions of the Prevention of Corruption Act, particularly under Section 5(1)(b) thereof which like Section 165 IPC covers the cases of receipt of valuable things by public servants from third parties. The appellant raised the following contentions:-

(i) There had been such a violent departure from the provisions of the Code in the matter of investigation and cognizance of offences as to amount to denial of justice and to call for interference by the issue of prerogative

writs.

(ii) The investigation and prosecution were wholly mala fide and had been set afoot by his immediate junior officer, one Sivasankar Mudaliar, Superintending Engineer, Madras who was related to the Chief Minister of the State.

(iii) The appellant's case was being discriminated from those of others who though equally guilty according to the prosecution were not only not being proceeded against but were promised absolution from all evil consequences of their misdeeds because of their aid to the prosecution.

The Madras High Court found partly in favour of the appellant as under:-

(a) "substantial information and evidence has been gathered before the so-called first information report was registered."

(b) the police officer who had conducted the enquiry prior to 27th June 1964 was a person competent to enter upon investigation.

(c) admittedly there has been an earlier probe by the Vigilance Department prior to 10th March 1964 on the basis where of he was not re-employed:

(d) there was definite information to the Government contained in the report dated 13th March, 1964 relating to corrupt activities of the appellant; and

(e) the "delay on the part of the investigating officer in registering the first information report may be an irregularity, but certainly the statements recorded subsequent to the receipt of definite information of the commission of an offence in gathering evidence

> of the offence would nonetheless be statements recorded during investigation and hit by Section 162 of the Criminal Procedure Code."

The Apex Court then recorded the following findings :-

> "The High Court found partly in favour of the appellant and held that the order of the special Judge directing the framing of a charge on consideration of the statements before him under Section 173(4) of the Code without reference to the illegalities in the investigation should be quashed. The High Court further directed the Special Judge to take up the matter once again and consider the case excluding from consideration all statements recorded under Sections 161 (3) and 164 which were found vitiated in the light of the observations made by it. A direction was also given to exclude portions of the statements which were self-incriminatory and confessional in character of the maker even if the same did not otherwise violate the provisions of Sections 162 and 163 of the Code."

The Apex Court took the view that the procedure adopted against the appellant before the laying of the first information report though not in terms forbidden by law, was so unprecedented and outrageous to shock one's sense of justice and fairplay. As regards the propriety of taking self-incriminatory statements, the Apex Court observed that the High Court recorded the statement of the learned Advocate General that the record of manipulations in the muster rolls by the subordinate officers of the appellant had to be disregarded as not proper material for consideration as the Special Judge had not considered these vitiating features in regard to the documents placed before him while ordering the framing of charges against the appellant. In view of that statement, the High Court did not examine the question at length. There the investigating officer admitted that he had provided certificates of immunity to at least two of the witnesses from the evil effects of their own misdeeds of tampering with the muster rolls, but the certificates were given after the statements had been signed. The Court did not accept that plea and observed that it was difficult to believe that the statements could have been made before

the grant of oral assurances regarding the issue of such certificates and that the persons who had given such immunity had made the statements incriminating themselves and the appellant and their inducement, threat or promise as mentioned in Section 24 of the Indian Evidence Act.

However, in the facts of the present case, it cannot be said that the so-called role of the PW 50 and 51 (B-3 & B-4) was similar to the role played by the subordinate officers in the case of P. Sirajuddin (supra) . The observations made by the learned Special Judge, quoted in para 8 of this judgment, also substantiate the decision not to allow application Exh. 311. We are referring to the said observations with reference to the evidence of PW 50 and PW 51 for the limited purpose of deciding the controversy in this appeal and only because the learned counsel for the appellants have relied on certain observations of the Apex Court and the Madras High Court in P Sirajuddin (supra).

10. As regards the decision of the Apex Court in **Suresh Chandra Bahri vs. State of Bihar, 1995 Supp (1) SCC 80,** relied upon on behalf of the appellant-accused, the Apex Court was concerned with the interpretation of the provisions of Section 120-A and 120-B IPC and in the process also interpreted the provisions of Section 306 of the Code of Criminal Procedure, but it was not at the stage of recording evidence that the Court considered the question of examining the approver. The Court held that if there is any defect of not examining the approver at the committal stage by the committing Magistrate and the defect is rectified later, merely by such curing of defect, no prejudice can be said to be caused to an accused person and, therefore, the trial cannot be said to be vitiated on that account. In the said decision, the Apex Court also observed that there can be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence. Section 306 lays down a clear

exception to the principle that no inducement shall be offered to a person to disclose what he knows about the offence.

11. Before we conclude, we may add that the learned counsel for accused has not been able to show any prejudice having been caused to the accused on account of the learned Special Judge having proceeded with recording of the evidence of the witnesses in question.

12. In view of the above discussion, we see no merit in this appeal. The appeal is accordingly summarily dismissed.

13. At this stage, the learned counsel for the appellants requests that out of the 14 witnesses, the witnesses who have not been examined so far, and that the witness whose examination-in-chief is over and cross-examination is not over, may not further be examined by the learned Special Judge for a period of two weeks.

The request is rejected.

[M.S. SHAH, J.]

[BANKIM N. MEHTA, J.]

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